90-903

No. _____

In The

Supreme Court of the United States

October Term, 1990

JOHN W. EVANS and THE ESTATE OF L. JUANITA EVANS,

Petitioners,

vs.

TWIN FALLS COUNTY, a governmental entity; HAROLD JENSEN, GARY KAUFMAN, and MARK E. STEVENS, individuals,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does state common law which holds that personal causes of action abate upon death defeat a valid civil rights claim brought under 42 U.S.C. §1983?

2. Can a state court of last resort ignore 42 U.S.C. §1988 if state law does not provide an adequate remedy for a violation of civil rights brought under 42 U.S.C. §1983?

3. Should the liability of local law enforcement agents for violations of federal constitutional rights depend on where the violation occurred?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, John W. Evans and the Estate of L. Juanita Evans, respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the Idaho Supreme Court for the State of Idaho in *John W. Evans and The Estate of L. Juanita Evans v. Twin Falls County, a governmental entity; Harold Jensen, Gary Kaufman, and Mark E. Stevens, Individuals,* (September 7, 1990).

OPINIONS BELOW

The opinion of the Supreme Court of the State of Idaho is dated June 12, 1990. A motion for rehearing was timely filed but was denied on September 7, 1990 and reported at 796 P.2d 87 (Idaho, 1990). A copy of the Idaho Supreme Court's Decision is included herein at Appendix A.

JURISDICTION

The date of the entry of the judgment sought to be reviewed is June 12, 1990.

The date of the denial of petitioner's timely motion for rehearing is September 7, 1990.

This Court has jurisdiction of this matter pursuant to 28 U.S.C. §1257(a) (1988). This petition for writ of certiorari is filed within the time allowed under Rule 13(1) of the Rules of this Court.

STATUTES AND REGULATIONS INVOLVED

1. 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. 42 U.S.C. §1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to the govern the said courts in the trial and disposition of the cause, and, if it

is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985,f and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

A CONCISE STATEMENT OF THE CASE

The petitioner, John Evans, has owned and operated a farm in south-central Idaho for virtually his entire life of sixty-seven years. He and his wife, Juanita Evans, were judgment debtors in an action which they believed to be on appeal.

Six members of the Twin Falls County Sheriff's Department suddenly appeared in the Evans' farmyard and surrounded the farm house intending to seize numerous pieces of farming equipment to satisfy the outstanding judgment. Three of the deputies, defendants herein, entered the farmhouse, although only one was so invited. All of them refused to leave when asked to do so. They threatened to seize the farming equipment even though they were told that many of the pieces of equipment belonged to others.

The deputies refused to accept a personal check in satisfaction of the judgment and when Mrs. Evans attempted to use the telephone in her own kitchen to call an attorney, she was physically assaulted and battered by Deputy Jensen. The other deputies did not intervene. All of the deputies remained in the kitchen until Mrs. Evans

was escorted to the bank and procured a cashier's check to satisfy the judgment. Upon delivery of the check then, and only then, did the law enforcement personnel withdraw and leave the premises.

Mrs. Evans was injured in the incident and sought hospital attention. She was also emotionally aggravated to a high degree because of the incident as was her husband in front of whom the assault and battery had occurred. Suit was filed against the defendants on December 23, 1987. Mrs. Evans died some eleven months after the incident and an amended complaint was filed on or about July 5, 1988 substituting the Estate of Juanita Evans for the deceased. (Appendix B) It was alleged that the privacy and liberty interests of the plaintiffs had been violated under color of state law.

Upon a motion for summary judgment, the District Court granted same on February 9, 1989 (Appendix C) and the Idaho Supreme Court affirmed, ruling *inter alia*, that Mrs. Evans' cause of action brought pursuant to 42 U.S.C. §1983 abated with her death under the common law of the State of Idaho. The Idaho Court also applied state law denying any recovery to Mr. Evans for negligent infliction of emotional distress and dismissed Mr. Evans' claims because there was no physical contact with or injury to Mr. Evans. It is from this precise ruling that petitioner comes before this Court to ask for review in light of *Robertson v. Wegman*, 436 U.S. 584 (1978) and *Carlson v. Green*, 446 U.S. 14 (1980), as well as more recent rulings which examine the scope of remedies under 42 U.S.C. §1983.

The federal questions which petitioner seeks to have reviewed were raised first in the amended complaint (App. B), before the State District Court (App. C) and were then briefed and argued to the Idaho Supreme Court which met those questions head-on in its opinion citing not only the relevant statutes but also *Robertson v. Wegman, supra*.

REASONS FOR GRANTING THE WRIT

The Idaho Supreme Court ruling that all causes of action brought under §1983 abate with death ignores 42 U.S.C. §1988, the instruction of this Court and is at odds with at least one other state court of last resort. It presents an important question of federal law which has not been, but should be, finally settled by this Court both with respect to the survival issue and, more generally, with respect to the duty of all courts to supply appropriate remedies for violations of 42 U.S.C. §1983 through the medium of 42 U.S.C. §1988 where state law is lacking. This case also presents an opportunity for this Court to address the limits of 42 U.S.C. §1988, *i.e.*, to what extent should courts strive to create a body of federal common law which will provide remedies to victims of §1983 violations. A review of the case law over the past 15 years demonstrates an over-all inconsistency and confusion with respect to this subject.

The precise issue as to survival was deliberately left open in *Robertson v. Wegman, supra*, at 595. There, this Court directed its attention to the Louisiana survivorship

laws, La. Code Civ. Proc. Ann., Art. 428 (1960) and La. Civ. Code Ann., Art. 2315 (West 1971) which caused abatement of a personal cause of action following death except as to surviving spouses, children, parents, or siblings. Mr. Shaw, the decedent, was survived by none of these close relatives. Yet the lower federal courts analyzed 42 U.S.C. §1988 in order to provide a remedy for his estate.

Section 1988 provides that when federal laws is "deficient" with regard to "suitable remedies" then federal courts are to be governed by:

> the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States.

In its analysis, then, this Court held in *Robertson* that none of § 1983's policies would be "undermined" if the action were to abate under Louisiana law. However, the Court expressly held:

> Our holding today is a narrow one, limited to situations in which no claim is made that state law generally is inhospitable to survival of section 1983 actions and in which the particular application of state survivorship law, while it may cause abatement of the action, has no independent adverse effect on the policies underlying section 1983. A different situation might well be presented, as the district court noted, if state law 'did not provide for survival of any tort actions,' 391 F.Supp., at 1363, or if it significantly restricted the types of actions that survive.

This case now presents the survival question squarely. The Idaho Supreme Court has stated without equivocation that §1983's policies are not compromised where an action arising under that statute abates upon the plaintiff's death or when state law provides no remedy where an actual, physical, injury has not occurred. (For the purposes of this Petition, we assume that the death of Mrs. Evans was not caused by the §1983 violation, although it was argued otherwise before the state courts.) The law of Idaho is clearly "inhospitable," then, to the survival of §1983 actions.

The role of §1988 in providing remedies in the context of federal civil rights legislation has often been the subject of this Court's attention. This was well stated in *Moor v. County of Alameda*, 411 U.S. 693, 703 (1973) as follows:

> The role of §1988 in the scheme of federal civil rights legislation is amply illustrated by our decision in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969). In *Sullivan*, the Court was confronted with a question as to the availability of damages in a suit concerning discrimination in the disposition of property brought pursuant to §1982 which makes no express provision for a damages remedy. The Court concluded that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies," *id.*, at 239, 90 S.Ct., at 405, and proceeded to construe §1988, which provides the governing standard in such a case, to mean "that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. . . . The rules of damages, whether drawn from federal or state sources, is a federal rule responsive

> to the need whenever a federal right is impaired." *Id.*, at 240, 90 S.Ct. at 406. Properly viewed, then, §1988 instructs federal courts as to what law to apply in causes of actions arising under federal civil rights acts. . . . " at 703.

This Court held in *Robertson, supra,* that the Louisiana statutory scheme did not provide an opportunity for the application of federal common law in preference to that state's statutory scheme. Yet, the Fifth Circuit in *Brazier v. Cherry,* 293 F.2d 401 (1961) and the Eighth Circuit in *Peter v. Smith,* 289 F.2d 153 (1961) have held state survivorship statutes in esteem when they reversed the common-law rule which caused the abatement of actions in the context of civil right actions brought under §1983. These federal circuits have understood, even anticipated, the teaching of this Court to choose between federal and state rules on damages, whichever better served the national policy expressed through §1983.

A detailed history of §1983 has been provided often by this Court, *Carey v. Piphus,* 435 U.S. 247, 253 *et seq.* (1978) providing only one of many examples. As this Court there noted, "The purpose of §1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." at 258.

Yet, we have a state court of last resort here misconstruing *Robertson, supra,* by finding that §1983's policies are not frustrated where there is absolutely no survival of actions under the harsh application of common law. There is not even an attempt to fashion any remedy or to turn to the federal common law because of

§1988. Rather, the Idaho Supreme Court has mistakenly read this Court's remarks in *Robertson, supra*, that §1983's policies do not require that plaintiffs always win to mean that the defendant will always receive a windfall if the plaintiff dies before reaching the courthouse.

The confusion of the Idaho court can be dispelled if the writ is granted to petitioners. Further, this case can provide this Court the opportunity to squarely address the issue of whether state law, common or statutory, can limit the type or amount or even the availability of damages to estates in §1983 survival situations or to survivors in §1983 wrongful death actions. Justices Blackmun and White, in particular, and other members of this Court as presently constituted, have expressed an interest in addressing whether §1983 requires a federal rule of damages rather than occasional exceptions to state law.

Robertson, supra, and subsequent analogous cases have not clarified the issues. As one respected commentator put it:

> *Robertson* is a disappointing decision, not so much for the result but rather because of the approach the Court took to the threshold questions raised by §1988. *Robertson* was the Court's first §1983 survival case and the outcome might have turned on whether federal courts could develop federal rules to resolve matters not directly addressed by §1983. The Court, however, failed to review the language and legislative history of §1983 to determine whether it provided an appropriate survival policy, or, whether the federal common law of §1983 justified the development of such a policy. Nor did the Court interpret the deficiency clause of §1988 to determine whether it authorized resort

> to the federal common law to fill certain gaps in civil rights statutes. Thus, *Robertson* requires initial resort to state survival policies but offers little guidance on other issues that may arise in §1983 litigation.

Steinglass, 60 Ind. Law Jour. 559, 594 (1985), footnotes omitted.

The Colorado Supreme Court seems to have taken a mixed approach under similar circumstances. There, the trial court ruled that a state wrongful death action was the plaintiff's sole method of recovery in state court under a §1983 cause of action. In contradistinction to the holding by the Idaho court in this case, the Colorado Supreme Court held:

> In order to answer the question of remedies and limitations, we must determine whether existing state law is inconsistent with the federal policies underlying §1983. To the extent that any fundamental inconsistency exists between the state and federal policies, a claimant under §1983 is not limited to recovery under state law; and separate rules for recovery, consistent with federal policies, must be adopted.

Espinosa v. O'Dell, 633 P.2d 455, 461 (1981); 456 U.S. 430 (1982) dismissing cert. for want of jurisdiction.

Noting that state statutes had been enacted in order to reverse the harsh consequences of the common law which extinguished an injured party's personal and derivative tort claims, the Colorado court fashioned a remedy and reversed the trial court's dismissal of the plaintiff's §1983 action. Yet, the Court allowed some of the limitations found within the survival statute, C.R.S. 13-20-101(').

The Colorado court was both aware of and troubled by the nature of the "inconsistency" between state and federal law calling the issue "not completely clear." In fn. 4 at 460, the court noted that the United States Supreme Court has wrestled with the question in such cases as *Board of Regents v. Tomanio*, 466 U.S. 478 (1980, Brennan, J., dissenting); *Robertson v. Wegman, supra*, (Blackmun, J., dissenting); *Jones v. Hildebrant*, cert. dismissed, 432 U.S. 283 (1977, White, J., dissenting) but without success in settling the matter one way or the other. Indeed, the issue presented *is* difficult and raises important questions of federalism along with the identification of federal common law which is not "inconsistent" with the policies underlying §1983. Although each state is entitled to have its own laws concerning survivability of actions, the Supremacy Clause imposes on state courts a constitutional duty " . . . to proceed in such a manner that all the substantive rights of the parties under controlling federal law [are] protected." *Felder v. Casey*, 487 U.S. 131, 151 (1988) quoting *Garett v. Moore-McCormack*, 317 U.S. 239, 245 (1942).[1]

A quick survey of other approaches taken by other courts further illustrates the utility of issuing a writ of certiorari in this case. Consider, for example, the Seventh Circuit's analysis of Wisconsin law in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); the Fifth Circuit's decision regarding Georgia law in *Brazier v. Cherry*, 293

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[1] It is noted that Steven H. Steinglass argued for the petitioner in *Felder, supra*, and presumably is the author of the Indiana Law Journal article cited in this brief.

F.2d 401 (5th Cir. 1961); and the thoughtful analysis provided by the U.S. District Court in *Davis v. City of Ellensburg*, 651 F.Supp. 1248 (E.D. Wash., 1987). While those cases all involved death and §1983, the "borrowing" of state law, or its supplantation or its supplementation by federal common law, they reflect an uncertainty which can be ended by a definitive statement from this Court.

Idaho law also acts as outcome-determinative when comparing violations of state and federal officials within this state. Under this Court's holding in *Bivens v. Six Unknown Named Agents of Federal Bureau of Investigation*, 403 U.S. 388 (1971) and *Carlson v. Green*, 446 U.S. 14 (1980), a federal official in Idaho who violates a citizen's federal civil rights would be liable to suit by the person's estate but a state official who commits the same illegal action would not be so subject to suit. Both Justices Powell and Stewart have expressed their dissatisfaction with allowing different rules to govern the liability of federal and state officers for similar constitutional wrongs. *Carlson v. Green*, 446 U.S. 14, 29-30 (1980). If the Supremacy Clause means anything, then "federal law takes state courts as it finds them only insofar as those courts employ rules that do not impose unnecessary burdens or rights of recovery authorized by federal laws." *Felder v. Casey, supra*, at 150, quoting *Brown v. Western R.Co. of Alabama*, 338 U.S. at 298-299 (1949). *See, also, Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 336 (1988) (state rule designed to encourage settlement cannot limit recovery in federally created action).

The *Carlson* Court's decision is most interesting in that it did not resolve a question of how federal courts should apply state survivorship law on other issues in a

Bivens context but did make clear that state law requiring abatement should not be used if the decedent's death is caused by the constitutional violation complained of. One could be more confident of this Court's position in a §1983 context if §1988 had been involved in *Carlson*. Unfortunately, it was not because that statute does not apply in *Bivens* actions. This left the *Carlson* majority to conclude that the state survival policy of Indiana did not prevent the action for surviving where death resulted from the wrongful act itself and finding that a uniform federal rule of survivorship was preferable to the Indiana statute which caused the action to abate. It seems to be a short but important step to extend the *Carlson* and *Robertson* holdings to the situation presented to the Idaho Supreme Court. Yet, that Court found the step too high, too uncertain and refrained from taking it because of its misapprehension of its duty under §1988.

CONCLUSION

This Court has accorded §1983 "a sweep as broad as its language." *United States v. Price*, 383 U.S. 787, 801 (1966). However, as the Idaho, Colorado, and other decisions cited herein indicate, there is presently some confusion as to the similar sweep of a state court's duty to fashion a federal remedy where the state does not provide one or provides one but with severe limitations. Surely if §1988 means anything, then state courts should create an effective remedy when there is a deficiency in the federal provisions "necessary to furnish suitable remedies and punish offenses against the law of §1983 and its underlying policies." 42 U.S.C. §1988.

The goal of deterrence underlying the federal civil rights statutes should mean deterrence of all government officials. This should not depend on which particular plaintiff seeks to enforce constitutional rights once the line has been crossed. Whether the plaintiff is a person or that person's estate should not matter because the wrongful governmental conduct still needs to be deterred. The matter of compensation might even be seen as state specific to Idaho and the several other community property states on the basis that Mr. Evans, the surviving spouse, has an interest in the compensatory aspect of the federal civil rights statute just as much as his deceased wife, both before the after her death. That is to say, in a community property state the goals of deterrence and compensation as outlined in *Robertson, supra,* can still be achieved even if the plaintiff dies while awaiting trial on her §1983 claims.

For the reasons given above, it is urged that the Court grant the writ of certiorari in order to examine and to rule upon the state/federal interaction in effectuating the federal civil rights statutes in light of §1983 and §1988 presented by the facts of this case. Should the Court wish, this case can serve as the vehicle for much enlightenment and certainty in the §1983 body of law which may be more voluminous than need be on account of present uncertainties. In its broadest terms, this case could even allow this Court to consider the wise statement of at least one federal district judge who reluctantly "borrowed" from the canon of California law governing survival while commenting:

> This Court considers the better view to be that claims arising under section 1983 survive as a

> principle of federal common law without regard to state law. That view takes into consideration the need for a uniform policy of survival and damages. It recognizes the remedial purposes of the Act. It also eliminates the need to refer to, analyze, and rationalize state statutes that were not enacted in contemplation of the Act or its intent.

Guyton v. Phillips, 532 F.Supp. 1154, 1166 (N.D.Cal. 1981). Such a broad approach could, of course, be ignored in favor of a more narrow interest in settling the single question regarding the duties of courts to fashion §1983 remedies where none exist under state law.

Respectfully Submitted,

LOJEK & GABBERT CHARTERED

/s/ Donald W. Lojek
By: Donald W. Lojek
Counsel for Petitioners

APPENDIX A

John W. EVANS, and the Estate of L. Juanita Evans, Plaintiffs-Appellants,

v.

TWIN FALLS COUNTY, a governmental entity; Harold Jensen, Gary Kaufman, and Mark E. Stevens, individuals, Defendants-Respondents.

No. 17977.

Supreme Court of Idaho.

June 12, 1990.

Dissent on Denial of Petition for Rehearing Sept. 7, 1990.

Lojek & Gabbert, Chartered, Boise, for plaintiffs-appellants. Donald W. Lojek, argued.

Hamlin & Sasser, Boise, for defendants-respondents. David Sasser, argued.

BAKES, Chief Justice.

John and Juanita Evans brought suit against Twin Falls County and several deputy sheriffs alleging, *inter alia*, claims under 42 U.S.C. § 1983 for violation of their constitutional rights, assault and battery, false arrest and interference with contract. The Evanses' claim of damages was primarily for emotional distress. Subsequently, Juanita Evans died, and the complaint was amended to substitute "the Estate of L. Juanita Evans,"[1] and to

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[1] While the title to the amended complaint describes the plaintiffs as "John W. Evans and the Estate of L. Juanita

(Continued on following page)

allegedly add a wrongful death claim on behalf of Mr. Evans.[2] The district court granted summary judgment in favor of the defendants as to all theories of liability. Plaintiffs appeal.

The summary judgment record, viewed most favorably to the appellants, discloses that on April 15, 1987, six Twin Falls County deputy sheriffs went to the residence of John and Juanita Evans to execute on a writ of execution issued on a judgment which had previously been entered against the Evanses. Apparently six officers were dispatched because of a letter from the attorney levying

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(Continued from previous page)

Evans," the amended complaint, other than adding one sentence to Paragraph X alleging "this conduct was a proximate cause of the death of L. Juanita Evans who continued to suffer great emotional distress resulting in a fatal heart attack on March 23, 1988," was substantially identical to the wording of the original complaint. There was no allegation of the appointment of a personal representative of the estate who is joining the action as a party plaintiff in the amended complaint.

[2] The amended complaint gives no indication that John W. Evans is bringing a wrongful death action. His claim in the amended complaint is no different than his claim in the original complaint filed before the death of Mrs. Evans. The amended complaint does not allege that John W. Evans is either the personal representative of the estate of L. Juanita Evans, or a surviving heir who is authorized to bring a wrongful death action for the death of L. Juanita Evans under I.C. § 5-311. Nevertheless the district court, apparently assuming that plaintiff's amended complaint alleged a claim for wrongful death on behalf of John W. Evans, found that the uncontradicted evidence demonstrated that none of the defendants' acts proximately caused the death of Mrs. Evans. The case has been argued on appeal as though such a wrongful death claim had been pled. Accordingly, we address that issue in Part I.

the writ which was attached to the writ of execution and which warned the officers to expect resistance.

Three of the deputies – Kaufman, Jensen and Stevens – entered the house. The Evanses claim that only Kaufman was invited in, that Jensen and Stevens were asked to leave and that they refused. The Evanses' complaint alleged that the deputies stood in the doorway with their hands on their guns "very much like Gestapo agents," and on one occasion threatened "to arrest" Mr. Evans. Respondents denied these allegations and further submitted the deposition of Elmer Durraud, a farm implement repairman who was present at the scene, who stated that he did not hear any such threats of arrest.

The Evanses advised the deputies that the farm equipment upon which they wished to execute did not belong to the Evanses. Their complaint further stated that the deputies were "rude, loud, vulgar, threatening and unnecessarily demanding," and made the Evanses feel like prisoners in their own home. However, respondents point out that Mr. Evans admitted in his deposition that none of the deputies used profane language or restricted the Evanses from coming and going. Mrs. Evans tried unsuccessfully to contact her attorney by phone on one occasion and on a second attempt to use the phone it was alleged that Deputy Jensen restrained her from doing so by grabbing her arms and twisting them, forcing her downward, knocking the glasses off her face and causing her immense visible pain. Deputy Jensen stated that Mrs. Evans made disparaging remarks to him and she came at him with raised hands trying to strike him, but he warded her off.

The Evanses stated that the officers refused to accept a personal check for the judgment, while the officers stated that it was the policy of the county not to accept personal checks. The Evanses eventually agreed to satisfy the judgment against them with a cashier's check. The officers followed Mrs. Evans to the bank in town where she obtained a cashier's check, gave it to the officers, who thereupon radioed back to the house and told the remaining officers to leave.

The Evanses aver that this incident left Mrs. Evans profoundly shaken, upset, agitated, and deeply embarrassed and disturbed. Two days after the incident she went to see Dr. Carl Bontrager at Magic Valley Memorial Hospital, who prescribed a sedative and diagnosed her condition as "hyperventilation and acute anxiety." Mrs. Evans also saw Dr. James Spafford on September 22, 1987 (about five months after the incident), as she was complaining of back aches and headaches which she believed were related to the alleged altercation with Deputy Jensen. Dr. Spafford's opinion was that she was experiencing an "agitated depressive reaction, capsulities of the shoulder, and hyperventilation syndrome."

Mr. Evans stated that in the months following the incident Mrs. Evans was a "changed woman," that she cried frequently, talked of the incident constantly, was extremely nervous and depressed, and that the condition persisted up until her death from a heart attack on March 23, 1988 (some eleven months after the incident).

The Evanses filed a complaint against Twin Falls County and the three deputy sheriffs on December 23,

1987, three months before Mrs. Evans' death. The complaint alleged claims for assault and battery, unlawful arrest and violation of 42 U.S.C. § 1983, interference with the work of a contract mechanic,[3] and sought general damages for emotional distress, punitive damages, and special damages for medical expenses and lost mechanic's wages. On July 5, 1988, Mr. Evans filed an amended complaint allegedly adding a count for wrongful death, and asserting that Mrs. Evans' death was due to the incident in the house on April 15, 1987.

On February 15, 1989, District Judge Daniel B. Meehl entered a memorandum opinion granting respondents' motion for summary judgment and dismissing appellants' complaint with prejudice in its entirety. As to Mrs. Evans' assault and battery claims and the consequent physical and emotional injury and pain, the district court ruled that this kind of injury was personal to Mrs. Evans and therefore did not survive her death. Regarding the wrongful death claim, the district court relied upon the medical testimony of both the treating and examining doctors who found no connection between the death of Mrs. Evans and the incidents on April 15, 1987. The

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[3] While the plaintiffs' complaint alleged that the defendants interfered with a mechanic whom they had working on the machinery that afternoon, and "plaintiffs were thereby damaged in an amount and owing to the mechanic for time during work which he could not then perform the work," the mechanic testified in his deposition that he was not told that he could not work on the equipment, only that he could not move the equipment which had been levied on pursuant to the writ of execution. Accordingly, there is no factual basis for this claim.

district court dismissed the affidavit testimony by Mr. Evans, who claimed there was a causal connection between these events, as "inadmissible evidence" because it was "not valid medical testimony."

The district court also ruled that the Evanses' claims for false arrest, false imprisonment, interference with contract and assault and battery were barred under I.C. § 6-904, and further held that there was no factual support for a claim for false arrest or false imprisonment at any rate.

As to the constitutional claims under 42 U.S.C. § 1983, the district court found that "Mr. Evans has not stated any actions taken by the deputies that may have violated his constitutional rights." This was based upon Mr. Evans' deposition which admitted that none of the deputies had physically restricted Mr. Evans' free movement or his coming or going; that none of the deputies had told him that he could not leave the house. The trial court further observed that, even if Mr. Evans' complaint could be construed as containing a claim for negligent infliction of emotional distress, it failed under the decision in *Gill v. Brown*, 107 Idaho 1137, 695 P.2d 1276 (Ct.App. 1985), because there was no physical contact or injury to Mr. Evans. Likewise, the district court found that the record did not support a claim of intentional infliction of emotional distress based on *Davis v. Gage*, 106 Idaho 735, 682 P.2d 1282 (Ct.App.1984). As to Mrs. Evans' claim of a violation of 42 U.S.C. § 1983, the district court ruled that the incidents of April 15th do not "shock the conscience of the court," and therefore the constitutional threshold had not been met by the plaintiffs. We will analyze these various claims separately.

I

THE WRONGFUL DEATH CLAIM

Assuming that Mr. Evans' complaint alleges a wrongful death claim, we first address the issue of whether the district court erred in granting summary judgment in favor of the deputies on any alleged wrongful death claim. Mr. Evans contends that the alleged grabbing and shaking of Mrs. Evans on April 15, 1987, had an ongoing deleterious effect that resulted in her ultimate death from cardiac arrest on March 23, 1988. The district court held that the alleged incidents of April 15, 1987, were not the proximate cause of Mrs. Evans' death, relying on the testimony of Dr. Stott, an expert in cardiovascular disease, and the testimony of Drs. Bontrager and Spafford, who had both examined and treated Mrs. Evans. In Dr. Stott's opinion there was "no causal relationship whatsoever between any of the events that had occurred at the Evans home on April 15, 1987, and Mrs. Evans' death as a result of cardiac arrest on March 23, 1988." The treating physicians agreed. The district court also ruled that the Evanses produced no admissible evidence as to causation, the only evidence being the affidavit of Mr. Evans in which he states his belief that his wife's death was proximately caused by the incidents of April 15th. The district court characterized the affidavit as "not valid medical testimony." We agree with the district court.

Under Rule 56(e) of the Idaho Rules of Civil Procedure, the affidavits supporting and opposing summary judgment "shall be made on personal knowledge, and shall set forth such facts as would be admissible in evidence. . . . " The district court held that Mr. Evans's

affidavit containing his lay opinion that the events on April 15, 1987, caused Mrs. Evans' death eleven months later was not admissible evidence.

Under the Idaho Rules of Evidence Rules 701 and 702, and the decisions of this Court, the trial court has discretion in determining whether to allow a lay witness to express an opinion relating to causation.

The relevant Idaho Rules of Evidence are:

> **Rule 701. Opinion testimony by lay witness.** – If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.
>
> **Rule 702. Testimony by experts.** – If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Since Mr. Evans was not testifying as an expert, I.R.E. 701 is the applicable rule. It provides that a trial court may permit the opinion evidence of a non-expert if the opinion evidence "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." The decisions of this Court and the Court of Appeals, both before and after the adoption of the Rules of Evidence in 1985, have held that the admission of opinion testimony,

particularly that of non-expert witnesses, rests in the sound discretion of the trial judge. *State v. Cutler,* 94 Idaho 295, 486 P.2d 1008 (1971); *State v. Hopkins,* 113 Idaho 679, 747 P.2d 88 (Ct.App.1987); *State v. Curry,* 103 Idaho 332, 647 P.2d 788 (Ct.App.1982). I.R.E. 701 incorporates the standards from our earlier cases limiting lay opinion evidence to that which is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." The issue which the trial court had to decide in this case was whether the lay opinion of Mr. Evans that his wife's cardiac arrest was caused by the stress resulting from this event which occurred more than eleven months prior was "rationally based on the perception of the witness," particularly in the face of the testimony of three physicians who testified that there was no causal relationship whatsoever between the events that occurred at the Evanses' home on April 15, 1987, and Mrs. Evans' death as a result of cardiac arrest on March 23, 1988. Dr. Donald K. Stott, a cardiologist, testified that, "It is entirely unreasonable to even suggest any connection whatsoever between these events and the [cardiac arrest]." While our prior cases have not directly addressed the question of whether a lay person may offer opinion testimony as to the ultimate cause of death, we have held in *Flowerdew v. Warner,* 90 Idaho 164, 409 P.2d 110 (1965), that lay opinion testimony was inadmissible to prove the cause of a plaintiff's medical condition.

A majority of the states which have addressed this matter have held that:

> Where the subject matter regarding the cause of disease, injury, or death of a person is wholly

> scientific or so far removed from the usual and ordinary experience of the average person that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of death, disease or physical condition.

31A Am.Jur.2d, Expert & Opinion Evidence § 207; *Collette v. Collette*, 418 A.2d 891 (Conn.1979); *Galindo v. Riddell, Inc.*, 107 Ill.App.3d 139, 62 Ill.Dec. 849, 437 N.E.2d 376 (1982); *Woods v. Brumlop*, 71 N.M. 221, 377 P.2d 520 (1962).

We conclude that the trial court did not err in concluding that the lay opinion of Mr. Evans that his wife's death by cardiac arrest was caused by the events of April 15, 1987, was not admissible under I.R.E. 701 and the prior decisions of this Court and the Court of Appeals. Accordingly, if there was a wrongful death claim pled, the trial court did not err in dismissing it.

II

SURVIVAL OF MRS. EVANS' CLAIM

Mrs. Evans' original complaint alleged claims against the Twin Falls deputies alleging, *inter alia*, false arrest, assault and battery, and violation of her constitutional rights under 42 U.S.C. § 1983. After her death, an amended complaint was filed, purportedly joining "the Estate of L. Juanita Evans."[4] The district court dismissed these claims based on this court's decision in *Vulk v. Haley*, 112 Idaho 855, 736 P.2d 1309 (1987), holding that the claims did not survive the death of Mrs. Evans. The court quoted from the *Vulk* case that, "The philosophy,

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[4] See footnote 1.

simply stated, is that an injured person who is dead cannot benefit from an award for *his* pain and suffering." 112 Idaho at 859, 855 P.2d at 1313. On appeal, Mr. Evans asserts that his wife's claims do survive and can be asserted by her estate, pointing to our holding in *Doggett v. Boiler Engineering & Supply Co.*, 93 Idaho 888, 477 P.2d 511 (1970), to support his position. In *Doggett* we stated:

> "We hold therefore that, to the extent that there has been alleged, and the appellant can prove, damage to the community by way of depletion of community assets, reduction of the ability of the community to earn income, costs and expenses chargeable against community property, *and the general damages for pain and suffering*, such cause of action survives the death of the deceased spouse. . . . "

93 Idaho at 892, 477 P.2d at 515 (emphasis added). The district court rejected this argument based on our more recent holding in *Vulk, Haley*, 112 Idaho 855, 736 P.2d 1309 (1987), wherein we stated: "Therefore, an action for pain and suffering does not survive the death of the injured." 112 Idaho at 859, 736 P.2d at 1313.

At common law if the victim of a tort died before he recovered a judgment, the victim's right of action also died. *See* Prosser & Keeton on Torts, § 125(a) (5th ed. 1984); *Vulk v. Haley*, 112 Idaho 855, 736 P.2d 1309 (1987); *Moon v. Bullock*, 65 Idaho 594, 151 P.2d 765 (1944); *Russell v. Cox*, 65 Idaho 534, 148 P.2d 221 (1944). Furthermore, at common law where a person's death was caused by the wrongful act of another, the relatives and dependents of the victim had no cause of action of their own. *See* The Genesis of Wrongful Death, 17 Stanford L.Rev. 1043 (1964); *Vulk v. Haley*, 112 Idaho 855, 736 P.2d 1309 (1987);

Volk v. Baldazo, 103 Idaho 570, 573, 651 P.2d 11, 14 (1982) ("We deem it well settled that statutes authorizing actions for wrongful death are remedial in nature, designed to alleviate the harsh rule of common law that if an injured person died, his cause of action ceases to exist."). I.C. § 73-116 provides that the rules of the common law are in effect in Idaho unless modified by other legislative enactments. *See State v. Iverson*, 79 Idaho 25, 310 P.2d 803 (1957).

The common law rule precluding any claim on behalf of the relatives or dependents of a deceased person was modified in 1881 by the enactment of I.C. § 5-311, which provided:

> **5-311. Action for wrongful death.** – When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death;. . . .

Statutes similar to I.C. § 5-311 have been enacted in nearly every other state and were modeled after the Lord Campbell's Act, adopted in England in 1846. *See* McCormick, Damages § 93 (1982).[5]

However, the Idaho legislature has not enacted any statute specifically abrogating the common law rule of non-survival of causes of action *ex delicto* in cases where

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[5] In addition, at common law if the tortfeasor died the victim's right of action died with him. This rule has also been abrogated in Idaho by the enactment of I.C. § 5-327, which provides, "Causes of action arising out of an injury to the person or property, or death, caused by the wrongful act or negligence of another . . . shall not abate upon the death of the wrongdoer. . . . "

the victim dies before recovery. In *Vulk v. Haley*, 112 Idaho 855, 859, 736 P.2d 1309, 1313 (1987), the case relied upon by the trial court in dismissing the survival claim of the estate of Mrs. Evans, the Court held that tort actions "for pain and suffering [do] not survive the death of the injured." Appellant nevertheless argues that the legislature has abrogated the common law rule of non-survivability of tort actions in a husband-wife community property setting. Thus, appellant argues that the decision of this Court in *Doggett v. Boiler Engineering & Supply Co.*, 93 Idaho 888, 477 P.2d 511 (1970), modified the common law rule in a community property setting, such as is alleged to have existed between Mr. and Mrs. Evans in this case. *Doggett* did, indeed, find an implied modification of the common law rule based upon I.C. § 32-906, which statute the Court in *Doggett* assumed mandated that damages for pain and suffering were community property, and therefore the surviving spouse had a property interest in that pain and suffering and, to that extent, the claim for pain and suffering survived the death of the injured party because the claim was also the property of the surviving spouse. The Court in *Doggett* purported to overrule the contrary case of *Moon v. Bullock, supra*, stating that "to the extent that [*Moon*] *suggests that an action ex delicto* abates upon the death of a plaintiff *in a case such as presented here*, it is overruled." 93 Idaho at 890, 477 P.2d at 513 (emphasis added). However, the Court in *Doggett* incorrectly assumed that "general damages for pain and suffering" are a community asset in which the surviving spouse has a property interest, and therefore upon the death of the injured spouse does not abate. In the subsequent case of *Rogers v. Yellowstone Park Co.*, 97 Idaho 14,

20, 539 P.2d 566, 572 (1975), this Court held that "general damages for pain and suffering and emotional distress [are] the injured spouse's separate property," not community property. The Court in *Rogers* overruled, *sub silentio*, that part of the *Doggett* opinion which held that I.C. § 32-906 provided that pain and suffering was community property rather than the separate property of the injured spouse. The *Rogers* case rejected the rationale of the *Doggett* decision, and accordingly, *Doggett* does not support appellant's claim. As this Court recognized in *Vulk v. Haley*, 112 Idaho 855, 859, 736 P.2d 1309, 1313 (1987), "[A]n action for pain and suffering does not survive the death of the injured."

Consequently, the district court did not err in applying our recent decision in *Vulk v. Haley*, and dismissing any survival claim of the estate of Mrs. Evans on the basis that her claims did not survive her death.[6]

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[6] The district court further ruled in the alternative that even if such claim survived Mrs. Evans' death, they were barred under the exceptions to liability provisions of I.C. § 6-904(3) as arising out of an assault and battery. The pertinent provisions of that statute are as follows:

> **6-904. Exceptions to governmental liability.** – A governmental entity and it employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:
>
> . . . .
>
> 3. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

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III

42 U.S.C. § 1983 CLAIMS

A. *Claim of Mr. Evans.* The district court stated that Mr. Evans had not produced any evidence to counter the affidavits supporting the defendants' motion for summary judgment which demonstrated that none of Mr. Evans' constitutional rights had been violated, and therefore there was no basis for a 42 U.S.C. § 1983 claim on behalf of Mr. Evans. The trial court specifically found that the defendants were validly on the premises with a writ of execution to serve, and that Mr. Evans' own deposition established that he did not try to leave his house, nor did the deputies tell him that he could not leave his house, nor did they restrain him. The trial court concluded that none of his constitutional rights were violated. We have

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On appeal, Mr. Evans argues that the exception does not apply because there was a question of fact as to whether Officer Jensen acted with "malice" toward Mrs. Evans stemming from several unrelated incidents in the distant past and also inferred by his conduct toward Mrs. Evans on April 15, 1987. As we stated in *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1987), malice within the definition of the Tort Claims Act means "actual malice" which requires a wrongful act without justification combined with ill will. The record before the district court at the time the summary judgment was granted contains no evidence that the defendants acted with the requisite malice or criminal intent to circumvent the exceptions to liability contained in I.C. § 6-904(3). We therefore affirm the district court's ruling on the issue of immunity.

reviewed the record and agree that Mr. Evans has not established any evidence raising a triable issue of fact that his constitutional rights were violated. Accordingly, we affirm the trial court's dismissal of Mr. Evans' 1983 claim.

B. *Claim of Mrs. Evans.* Before we consider the merits of this claim it is necessary to decide whether the constitutional claim survives Mrs. Evans' death; if not, then our consideration of the merits of such claim is thereby obviated.

42 U.S.C. § 1983 creates a cause of action for deprivation of federal statutory or constitutional rights. The statute reads in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

By its very terms, the statute grants a cause of action "to the party injured." Thus, it is a *personal* action. The United State Supreme Court addressed the issue of survivability in *Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978), and acknowledged that determination of the applicable survivorship rule for actions brought under 42 U.S.C. § 1983, was governed by

42 U.S.C. § 1988.[7] The Court in *Robertson* paraphrased the statute, stating that "where federal law is thus deficient, § 1988 instructs us to turn to the common law, as modified and changed by the Constitution and statutes of the (forum) state so long as these are not inconsistent with the Constitution and laws of the United States." 436 U.S. at 587, 98 S.Ct. at 1994. The Court in *Robertson v. Wegmann* found that while the common law had been modified by statute in Louisiana to permit survival for the benefit of certain immediate heirs, the plaintiff Wegmann, the executor of the estate of Shaw, was not an heir, and therefore the Supreme Court held that the § 1983 action did not survive, and that Wegmann could not bring the § 1983 action.

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[7] Title 42 U.S.C. § 1988 provides in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, *the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause,* and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. (Emphasis added.)

As previously discussed in Part II, the common law has not been modified or changed in Idaho either by statute or the Constitution, and therefore the general common law rule that personal causes of action do not survive the death of the injured party is the rule in Idaho. *Vulk v. Haley*, 112 Idaho 855, 736 P.2d 1309 (1987). The § 1983 cause of action, by virtue of the statute's express language, is a personal cause of action, actionable only by persons whose civil rights have been violated. Thus, under Idaho law Mrs. Evans' § 1983 action does not survive.

The application of the Idaho common law non-survivability rule is presumably the same as the federal common law rule and is not inconsistent with the Constitution and laws of the United States. The *Robertson* Court articulated the standard for determining when state law is inconsistent with federal law by stating:

> "In resolving questions of inconsistency between state and federal law raised under § 1988, courts must look not only at particular federal statutes and constitutional provisions, but also at 'the policies expressed in (them).' "

436 U.S. at 590, 98 S.Ct. at 1995. The Court then stated that, for the purposes of the § 1988 analysis, state law cannot be deemed inconsistent with federal law merely because it results in a loss of the action. *Id.* The Court went on to identify the two principal policies underlying § 1983 as compensating those injured by an infringement of their civil rights and deterring official illegality. The Court concluded:

> The goal of compensating those injured by a deprivation of rights provides no basis for

> requiring compensation of one who merely survives as the executor of the deceased's estate. And, given that most Louisiana actions survive the plaintiff's death, the fact that a particular action might abate surely would not adversely affect § 1983's rule in preventing official illegality, at least in situations in which there is no claim that the *illegality* caused the plaintiff's death.

436 U.S. at 592, 98 S.Ct. at 1996.

Since we have previously concluded that the uncontradicted medical evidence in the record justifies the trial court's summary judgment against plaintiff's claim that the alleged illegality of the officers caused the plaintiff's death, this case is controlled by the decision of the United States Supreme Court in the *Robertson* case, and "the fact that a particular action might abate surely would not adversely affect § 1983's rule in preventing official illegality. . . . " Accordingly, we conclude that under the standards set out by the United States Supreme Court in *Robertson v. Wegmann*, application of the Idaho common law precluding survivability of a tort claim is not inconsistent with 42 U.S.C. §§ 1983, 1988.[8] *See also Owens v.*

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[8] Because we find that if Mrs. Evans had a § 1983 action it did not survive her death, it is unnecessary to address whether or not Mrs. Evans had such a § 1983 action. The trial court found that, "the alleged grabbing and shaking of Mrs. Evans does not arise to this constitutional level. Looking at this point most favorably to the plaintiffs, there are no facts to show that Mrs. Evans was maliciously or sadistically beaten. At the most, she was allegedly grabbed and shaken." Quoting from our decision in *Doe v. Durtschi*, 110 Idaho, 466, 473, 716 P.2d 1238, 1295 (1986), the trial court stated, " '[A] plaintiff must allege

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Okure, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989) (personal injury claims brought under 42 U.S.C. § 1983 are governed by the state's residual or general statute of limitations).

IV

NEGLIGENT OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Finally, Mr. Evans' amended complaint might be construed as asserting either negligent or intentional infliction of emotional distress, although it is not clear from the complaint that these claims are raised. The trial court analyzed both these torts and concluded that if a claim of negligent infliction of emotional distress was made, it was not supported by the record because, under *Gill v. Brown*, 107 Idaho 1137, 695 P.2d 1276 (Ct.App.1985), there must be some physical injury associated with the emotional distress.

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sufficient facts which, if proven, would demonstrate that the governmental entity should have reasonably anticipated that one of their employees would commit an intentional tort.' The plaintiffs have not alleged any facts pertaining to Twin Falls County. The plaintiffs have not alleged the existence of any policy of Twin Falls County that was the cause of the plaintiffs' damages. 'A municipality is not liable under § 1983, unless the constitutional violation "implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by the body's officers." ' *Herrera v. Conner*, 111 Idaho 1012, [1019], 729 P.2d 1075 [1082] (Ct.App. 1987) [citation omitted]. Plaintiff has not offered anything to show that such a policy existed in Twin Falls County."

Subsequent to the trial court's decision, in our most recent case of *Czaplicki v. Gooding Joint School Dist.*, 116 Idaho 326, 775 P.2d 640 (1989), we again held that in order to allege and prove a claim for negligent infliction of emotional distress there must be both an allegation and proof that a party claiming negligent infliction of emotional distress has suffered a physical injury, *i.e.*, a physical manifestation of an injury caused by the negligently inflicted emotional distress. In *Czaplicki* we said, "It is beyond dispute that in Idaho no cause of action for negligent infliction of emotional distress will arise where there is no physical injury to the plaintiff." 116 Idaho at 332, 775 P.2d at 646. In *Czaplicki* both the plaintiff's complaint and affidavit "describe[d] various emotional injuries that have manifested themselves in physical symptoms such as severe headaches, occasional suicidal thoughts, sleep disorders, reduced libido, fatigue, stomach pains and loss of appetite." 116 Idaho at 332, 775 P.2d at 646. The Court in *Czaplicki* held that those allegations were sufficient to constitute an allegation of a manifestation of a physical injury to raise an issue of fact which required a trial on that issue. In this case, the "affidavit"[9] of Mr. Evans, in opposition to the motion for summary judgment, described in some detail the effect which the

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[9] The "affidavit" filed by Mr. Evans, while in partial affidavit form, is not subscribed and sworn to as an oath or affirmation, as required of an affidavit. I.C. § 51-109. Rather, the signature of Mr. Evans was merely acknowledged by the notary public in the manner required for the acknowledgment of signatures on deeds for recording under I.C. § 55-710. Thus, the facts stated in the "affidavit" are not under oath as required by I.R.C.P. 56(e).

conduct of the defendant had upon his wife, but makes no mention of any emotional distress to Mr. Evans, nor any physical manifestation of a physical injury resulting to Mr. Evans as a result of any emotional distress negligently inflicted upon him as a result of the defendants' conduct. The only allegation in the complaint of a physical condition which could be construed as a "physical injury" within the meaning of our decision in *Czaplicki* is Mr. Evans' allegation that he required medical treatment and medication for his elevated blood pressure allegedly caused from emotional distress. However, there was a substantial amount of medical testimony in the record all of which clearly explained that Mr. Evans' high blood pressure condition preceded the events in question and had no relationship to the incident in this case. In his own deposition Mr. Evans testified that he had had high blood pressure for many years before the incident in question:

A. No. I have got high blood pressure.

Q. When was that diagnosed?

A. Oh, the railroad claimed it was years ago, a little bit high; but they never did have me do anything for it. But since I have been back up here, I take pills for it.

Q. When did you first see a physician here for that condition?

A. I think I went to Gibney first, I believe. Now, I don't know what year that was. It would have been in the 60's.

These facts are in turn corroborated by the testimony of Dr. Spafford, Mr. Evans' treating physician. In his deposition, Dr. Spafford testified to Evans' high blood pressure which existed before the events in question:

A. I saw Mr. Evans 11-12-86. He was transferring from Dr. Virgil Telford, who had retired; and he wanted to follow up on his blood pressure.

Q. Is it accurate to say, that as of the date that he transferred to you on 11-12-86, that he had an existing blood pressure problem?

A. Yes.

Dr. Spafford also testified in his deposition that before the events in question he had urged Mr. Evans to lose weight, and to continue his medication for high blood pressure on a daily basis, and to get a blood pressure check every two weeks, and an appointment in two months or so as needed. Dr. Spafford went on to testify that Mr. Evans did not follow up on his appointments as recommended to get his blood pressure checked and did not see him again until August 3, 1987, over three months after the incidents on April 15, 1987, which form the basis for Evans' claim. Finally, when asked if he could render an opinion regarding the potential connection between Mr. Evans' physical condition and the alleged incidents on April 15, Dr. Spafford stated: "No, I couldn't make a connection." Hence, in Dr. Spafford's opinion, Mr. Evans' blood pressure was not proximately caused by the events of April 15, 1987. There is, therefore, no evidence in this record to support the general allegation in the amended complaint that Mr. Evans' high blood pressure was caused by the incidents on April 15, 1987. Mr. Evans' opinion on that medical issue would in any event be inadmissible under Rule 701 of the Idaho Rules of Evidence and our cases interpreting that rule. *Flowerdew v. Warner*, 90 Idaho 164, 409 P.2d 110 (1965). Under Rule 56(e) of the Idaho Rules of Civil Procedure, the affidavits opposing summary

judgment "shall be made on personal knowledge, and shall set forth such facts as would be admissible in evidence. . . . " We therefore agree that the district court did not err in granting summary judgment on Mr. Evans' claim for negligent infliction of emotional distress.

Regarding the claim that Mr. Evans' amended complaint asserted a claim that the defendants were guilty of intentional infliction of emotional distress, the trial court reviewed the four elements necessary to establish a claim of intentional infliction of emotional distress as set out in *Davis v. Gage*, 106 Idaho 735, 682 P.2d 1282 (Ct.App.1984), and concluded that "the record did not establish that all four elements have been met." We agree with the trial court that the record does not support a claim of intentional infliction of emotional distress. The four elements which a plaintiff must show to be able to recover for intentional infliction of emotional distress are: (1) the conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a casual connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe. *Davis v. Gage, supra.* The Restatement (Second) of Torts, which was instrumental in establishing the tort of intentional infliction of emotional distress, describes in Section 46, comment j (1965), how severe the emotional distress must be before it is actionable:

> The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror,

> grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. *It is only where it is extreme that the liability arises.* Complete emotional tranquillity is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. *Severe distress must be proved;* but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed. (Emphasis added.)

As the trial court observed, "The physical manifestations [high blood pressure] complained of were present before the incident on April 15, 1987." Furthermore, the trial court found, "There are no facts that show the required severity," even assuming that there was a causal connection between the alleged wrongful conduct and the physical manifestations of emotional distress complained of. Accordingly, the trial court did not err when it concluded that "the facts and records do not indicate that Mr. Evans suffered any actionable emotional distress."

The judgment of the district court is affirmed. Costs to respondents. No attorney fees allows.

JOHNSON, BOYLE and McDEVITT, JJ., concur.

BISTLINE, Justice, dissenting.

I must dissent from that portion of the majority opinion which holds that Mrs. Evans § 1983 action does not survive her death. The majority states that "this case is controlled by the decision of the United States Supreme

Court in the *Robertson [v. Wegmann]* case, and 'the fact that a particular action might abate surely would not adversely affect § 1983's rule in preventing official illegality. . . . ' " Op. at ___, 796 P.2d at 95 (1990). Unfortunately, the majority has taken this quote from *Robertson* completely out of context. The result is that the majority's holding is skewed one-hundred eighty degrees in the wrong direction. In *Robertson* the United States Supreme Court held:

> Despite the broad sweep of § 1983, we can find nothing in the statute or its underlying policies to indicate that a state law causing abatement of a particular action should *invariably* be ignored in favor of a rule of *absolute* survivorship. The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law. . . . No claim is made here that Louisiana's survivorship laws are in general inconsistent with these policies, *and indeed most Louisiana actions survive the plaintiff's death.* See La.Code Civ.Proc.Ann., Art. 428 (West 1960); La.Civ.Code Ann., Art. 2315 (West 1971). *Moreover, certain types of actions that would abate automatically on the plaintiff's death in many States – for example, actions for defamation and malicious prosecution – would apparently survive in Louisiana.* In actions other than those for damage to property however, Louisiana does not allow the deceased's personal representative to be substituted as plaintiff; rather, the action survives only in favor of a *spouse,* children, parents, or siblings. . . . But surely few persons are not survived by one of these close relatives, and in any event no contention is made here that Louisiana's decision to restrict certain survivorship rights in this manner is an unreasonable one.

It is therefore difficult to see how any of § 1983's policies would be undermined if Shaw's action were to abate. The goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate. And, *given that most Louisiana actions survive the plaintiff's death*, the fact that a particular action might abate surely would not adversely affect § 1983's role in preventing official illegality, at least in situations in which there is no claim that the illegality caused the plaintiff's death. A state official contemplating illegal activities must always be prepared to face the prospect of a § 1983 action being filed against him. In light of this prospect, even an official aware of the intricacies of Louisiana survivorship law would hardly be influenced in his behavior by its provisions.

It is true that § 1983 provides 'a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.' *Mitchum v. Foster, supra*, 407 U.S. [225] at 239, 92 S.Ct. [2151] at 2160 [32 L.Ed.2d 705 (1972)]. That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1988 refers us. A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the *only* benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But § 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted to rejected

based *solely* on which side is advantaged thereby. *Under the circumstances presented here,* the fact that Shaw was not survived by one of several close relatives should not itself by sufficient to cause the Louisiana survivorship provisions to be deemed 'inconsistent with the Constitution and laws of the United States.' 42 U.S.C. § 1988.

Our holding today is a narrow one, limited to situations in which no claim is made that state law generally is inhospitable to survival of § 1983 actions and in which the particular application of state survivorship law, while it may cause abatement of the action, has no independent adverse effect on the policies underlying § 1983. A different situation might well be presented, as the District Court noted, if state law 'did not provide for survival of any tort actions' [*Shaw v. Garrison*], 391 F.Supp. [1353], at 1363 [(E.D.La.1975)], *or if it significantly restricted the types of actions that survive.* . . . We intimate no view, moreover, about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death. . . .

Here it is agreed that Shaw's death was not caused by the deprivation of rights for which he sued under § 1983, and Louisiana law provides for the survival of most tort actions. Respondent's only complaint about Louisiana law is that it would cause Shaw's action to abate. We conclude that the mere fact of abatement of a particular lawsuit is not sufficient ground to declare state law 'inconsistent' with federal law.

Robertson v. Wegmann, 436 U.S. 584, 590-95, 98 S.Ct. 1991, 1995-97, 56 L.Ed.2d 554 (1978) (emphasis added) (footnotes and citations omitted).

The case before this Court is precisely the kind of "different situation" which the Supreme Court indicated would yield a different result than that reached in *Robertson*. As the majority has clearly stated, the general rule in Idaho is that actions personal to an individual do not survive that individual's death. And, states the majority, violations of constitutional rights for which compensation is sought under § 1983 are personal actions. It is therefore eminently reasonable to state that Idaho law has "significantly restricted the types of actions that survive." *Robertson*, 436 U.S. at 594, 98 S.Ct. at 1997. The rationales which were offered by the *Robertson* Court to justify its "narrow" holding were based on the liberality of Louisiana's survivorship statutes. Those rationales simply do not apply in Idaho, where the harsh and unforgiving rule of the common law regarding survival of actions still prevails. It is quite likely that the United States Supreme Court would find that Mrs. Evans' § 1983 action should survive her death. This Court should have the jurisprudential foresight to rule likewise.

ON DENIAL OF PETITION FOR REHEARING

BISTLINE, Justice, dissenting on denial of petition for rehearing.

The Court, by the same four to one vote which resulted in a majority opinion, has now brushed aside the Evans' petition for rehearing, or, alternatively, a modification which would erase this Court's endorsement of what is aptly referred to as "nothing short of an armed invasion" and "a show of force" amounting to an invasion of privacy.

The brief which has been presented to us on behalf of Mr. Evans is compelling, thus making it difficult to understand the ready denial, especially where the Court tenders not one word of explanation or reasoning. It is indeed disappointing to see the Court moving backward when it has the capability to strive for, and achieve the ends of justice in all cases, not just a select few. Attached for the perusal of a candid bench and bar is the succinct, eloquent brief to which the Court turns a deaf ear and an unseeing eye.

BRIEF IN SUPPORT OF PETITION FOR REHEARING OR, IN THE ALTERNATIVE, FOR EXTRAORDINARY APPELLATE PROCEDURE

It is feared that the Court has overlooked a very important procedural error committed by the District Court. No mention of this procedural error, one way of the other, is noted in the Court's Opinion but, if the Court agrees that this error did occur, the case should be remanded and not affirmed.

A pivotal fact on which the Court did rely was Dr. Stott's opinion formed after reading the medical records of Mrs. Evans, that her death could not have been caused by the incident which forms the basis of this action.

The Court's Opinion at p. 91, refers to Dr. Stott's opinion and cites it with approval reflecting the great esteem which the law reserves for practitioners of the healing arts. In truth, Dr. Stott's opinion becomes one of the pivotal aspects of this Court's decision. Dr. Stott has rendered his opinion and it counters the opinion of the husband of the deceased. The Court has ruled that we do

not concern ourselves with that opinion because it is only a layman's opinion grounded only upon 30 years' experience with this deceased woman. A husband who has caressed, loved, shared with, and intimately known the deceased woman for more than 30 years is of absolutely no importance and the holding of the case so indicates. His opinion pales into nothing when set against the conclusion of a physician who did not witness the triggering event, who did not know the deceased woman, who did not interview the witnesses or read the depositions of the witnesses or converse with or read the depositions of the examining or treating physicians, who did not examine the body, who had no autopsy report to read, but who did read some medical records kindly set before him by Defendant's counsel.

Since this important, pivotal, opinion of Dr. Stott comes to us by way of an Affidavit, why, the Court might ask, is there no deposition of Dr. Stott? Why is there no cross-examination of Dr. Stott? Why does this court not have a countervailing affidavit from a physician?

The answer is found at p. 21 of Appellant's Brief. The reason why Dr. Stott's opinion stands like the Colossus of Rhodes over this case, an uncontradicted beacon of truth and light, is that it was not timely submitted by Defendant's counsel. Discovery was to cut off on January 13, 1989. Two days before and after office hours, some 47 witnesses were identified by the Defendants by way of supplemental answers to interrogatories. The response of plaintiffs was to move the Court to exclude all of the testimony of all of these suddenly identified witnesses, one of whom was Dr. Stott. That Motion in Limine and 13-page supporting brief was timely filed and noticed for

hearing before the Court for January 30th. But the Trial Court refused to take up that motion.

Dr. Stott's opinion by way of Affidavit was not filed with the Court until the date of January 17, 1989, which was only 13 days before the argument for Summary Judgment. A Motion to Strike the Affidavit was made during oral argument by Plaintiff's counsel (TR 43 II. 2-5), but the trial court never got around to hearing that motion or the Motion in Limine, instead having an off-again-on-again approach to the hearing on the Motion for Summary Judgment which literally lasted all day having been interrupted by many delays. When the Court summarily stalked off the bench at 5:00 o'clock stating that there were some things to attend to, the Motions relative to Dr. Stott's evidence were still not addressed.

The objection to Dr. Stott's offer of evidence was filed primarily because the Plaintiffs could not cross-examine nor file a counter-affidavit. Rule 56(c) seems to be quite clear in stating that Affidavits shall be served at least 28 days before the time fixed for the hearing. The reason for this rule is also apparent. That is so the adverse party can serve opposing affidavits at least 14 days prior to the date of the hearing. If observed, this might save everyone some time and trouble because questions of fact would appear and then obviate the necessity for argument on Rule 56.

If we take away from the record the Affidavit of Dr. Stott, we are not left with any valid medical opinion that the death of Mrs. Evans was not caused by the incident. The depositions of Dr. Spafford, Dr. Swartling, and Dr. Bontrager have been reviewed and none state that there

is no chance of a causal connection between the incident and the death of Mrs. Evans. Dr. Spafford comes closest at pps. 25 and 26 of his deposition but he never does state that the death was *not* connected. He *does* say at pps. 28-29 that stress can cause heart damage. The point is, however, that without Dr. Stott's affidavit, Defendants have zero evidence on which to base their Rule 56 motion and that does not seem to have been taken into account by the Court in its opinion.

The second reason for the Petition for Rehearing is to argue, if indeed the Court needs argument, on the case of *Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978). It is clear from the portion of that case cited by Justice Bistline that the majority opinion is reflective of a misreading of the *Robertson* decision. The U.S. Supreme Court's opinion itself states, "a different situation might well be presented, as the District Court noted, if State law 'did not provide for survival of any tort actions' [*Shaw v. Garrison*], 391 F.Supp. [1353] at 1363 [(E.D.La 1975)], or if it significantly restricted the types of actions that survive. . . . " It is quite likely that the United States Supreme Court would find that Mrs. Evans' § 1983 action should survive her death and indeed, this Court should likewise rule.

The holding of this Court does seem to be anomalous to fundamental notions of fair play and civil liberties. What public policies are advanced by allowing police officers to violate the civil rights of a citizen and to pay for those violations of civil rights if the citizen lives but fortuitously escape payment if the citizen dies? What possible public policy is advanced by allowing the

wrongdoer to escape without paying for the wrong that he does?

Hypothetically, if there were a citizen who has no heirs, is not this Court stating to law enforcement officers within the state, "shoot to kill," because if they are successful in their violation of civil and constitutional rights, the cause of action abates upon the death and the activities of the police officers never have to be justified or accounted for. What possible public policy is advanced by this interpretation of the law? Why should death cause an abatement in a civil rights case where the law attempts to proscribe behavior, not necessarily to compensate the victim.

Clearly, § 1983 beginning with *Monroe v. Pape*, and down to the present day indicates that law enforcement agencies are to be held accountable for their violations of the constitution or statutes which protect property or liberty interests. What possible public policy is advanced by this Court's ruling that a cause of action abates with the death of the person who was victimized by illegal and unconstitutional police activity? This writer can think of none. None were offered by the Court in its decision. The decision is clear but the foundation for it or the metaphysics involved are not articulated.

Finally, the Court seems to ground its decision upon the fact that the officers were "lawfully" serving a writ of execution. Perhaps this point was lost on the Court and bears repeating: there were six police officers that came with numerous police vehicles in order to surround this farm house and seize farm equipment. They would not take a check for the judgment but ultimately forced the

farm wife to travel into town to get a certified check from her banker. When she handed over that certified check, then the officer who received the check radioed to the others at the farm and they then, and only then, vacated the premises.

This is nothing short of an armed invasion. It was an unreasonable show of force and violates the privacy interest of the First Amendment and the liberty interest of the Fourteenth Amendment. Perhaps the Court has not appreciated the argument being made here. If it has appreciated the argument and finds that it is entirely appropriate for such a show of force and that this does not even present a jury question as to whether the privacy or property interests of the surviving Plaintiff, Mr. Evans, were violated, then it is submitted that this Court has passed up a good opportunity to protect Idaho citizens in their homes against unreasonable police conduct. Why do we not submit a case like this to the citizens of Twin Falls County for their verdict? The assumption which underlies this Court's decision seems to state that as long as there is a valid writ in the hand of the policeman he cannot violate the civil rights of a citizen with the other. No case stands for that proposition and it is hoped that this decision will be modified accordingly.

APPENDIX B

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

JOHN W. EVANS and the ESTATE OF L. JUANITA EVANS, Plaintiffs, vs. TWIN FALLS COUNTY, governmental entity; HAROLD JENSEN, GARY KAUFMAN, and MARK E. STEVENS, individuals, Defendants.	Case No. 40121 AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

COME NOW Plaintiffs, by and through their undersigned counsel of record, and for their cause of action against the Defendants, allege as follows:

I.

John W. Evans and L. Juanita Evans were at all times material hereto residents of Twin Falls County, Idaho.

II.

The Twin Falls County sheriff's Department is a law enforcement agency of the County of Twin Falls.

III.

Harold Jensen, Gary Kaufman, and Mark E. Stevens were at all times material hereto Deputy Sheriffs of Twin Falls County.

IV.

On or about April 15, 1987, Defendant Deputies Jensen, Kaufman and Stevens entered onto Plaintiffs' property to execute upon a judgment previously entered against the Plaintiffs. The judgment was thought by Plaintiffs to be on appeal or not due and owing.

V.

In the course of proceeding with the execution upon the judgment, Deputy Jensen exercised unnecessary physical force and violence against Plaintiff L. Juanita Evans and unlawfully threatened her with arrest. While only one deputy was invited into the Evans' farmhouse, all entered while the family was taking their noon meal. The deputies stationed themselves at the exits from the kitchen, thus preventing anyone from leaving.

VI.

Despite being informed that the machinery on the Plaintiffs' property was not owned by the Plaintiffs,

Defendant Deputies Jensen, Kaufman and Stevens insisted upon seizing or threatening to seize that equipment for satisfaction of the judgment. Defendants were rude, loud, vulgar, threatening and unnecessarily demanding. Defendants did not make a good faith effort to verify the ownership of the property upon which they were attempting their execution.

VII.

Plaintiffs' employee, hired by Plaintiffs to work on the subject equipment that afternoon, was told by the Defendant Deputies not to perform any further work on the machinery that afternoon. Plaintiffs were thereby damaged in an amount due and owing to the mechanic for time during work which he could not then perform the work.

VIII.

Plaintiff Juanita Evans offered a personal check in satisfaction of the judgment amount. Despite telephonic assurances from the Plaintiffs' attorney that it would be satisfactory to accept Plaintiffs' personal check, Deputy Kaufman refused to accept Plaintiffs' personal check and insisted that Plaintiff Juanita Evans immediately travel to a local bank and secure a certified or cashier's check to satisfy the judgment amount. Mrs. Evans was forcibly restricted from further using her phone and physically assaulted and battered by Deputy Jensen.

IX.

The Deputy Defendants Jensen, Kaufman and Stevens were acting under the color of state law and were within the scope and course of their employment with the County of Twin Falls at all times hereto but not in good faith.

X.

As a proximate result of the aforesaid outrageous and negligent actions of said Defendants, Plaintiffs have been damaged by pain and suffering, fright, emotional upset, battery to Mrs. Evans, unlawful arrest, and distress as to both Plaintiffs. This conduct was a proximate cause of the death of L. Juanita Evans who continued to suffer great emotional distress resulting in a fatal heart attack on March 23, 1988.

XI.

As a result of a physical and emotional abuse experienced by Mrs. Evans by the Defendant Deputies, Mr. Evans required medical treatment and medication and treatment for emotional distress, elevated blood pressure, and physical pain resulting from the assault and battery received by Mrs. Evans at the hands of Deputy Jensen and the other Defendants.

XII.

Pursuant to Section 6-901 *et seq*. Idaho Code, Mr. and Mrs. Evans filed a Tort Claim against Twin Falls County and Deputies Jensen, Kaufman and Stevens on August 27,

1987. The Tort Claim complied with section 6-901 *et seq.* in all respects and no response to that Tort Claim has been made to the date of the filing of the original Complaint in this matter. Thus, the Amended Complaint is allowed pursuant to Section 6-909 Idaho Code as the Claim is deemed to be denied.

XIII.

The aforesaid conduct of the Defendants, which was a proximate cause of Mrs. Evans' death, violates the 14th Amendment to the Constitution of the United States and 42 U.S.C. § 1983. Plaintiffs have been damaged by those violations as aforesaid by peace officers who were then acting under color of state law.

WHEREFORE, Plaintiffs pray as follows:

1. For a judgment of a reasonable amount for damages, but no less than $500,000 for each Plaintiff, or the liability limits, if applicable, of Section 6-926, Idaho Code, whichever is greater.

2. For punitive damages in a reasonable amount.

3. For all medical and funeral costs incurred by Mrs. Evans or her estate related to this incident in an amount to be proven at trial.

4. For the sums lost in paying a mechanic for time during which he was restricted from performing any work by Defendants.

5. For Plaintiffs' costs, expenses and attorneys' fees necessarily incurred in prosecuting this cause pursuant to

the Idaho Rules of Civil Procedure, Section 12-121, Section 6-918A Idaho Code, and pursuant to 42 U.S.C. § 1988.

6. For such other and further relief as to the Court seems just.

DATED this 11th day of April, 1988.

LOJEK & HALL, CTD.

/s/ D.W.L.
Donald W. Lojek,
of the firm
Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

The Plaintiffs hereby demand trial by jury on all issues pursuant to Rule 38(b) IRCP and request a jury of 12 persons.

/s/ D.W.L.

VERIFICATION

STATE OF IDAHO)
: ss.
County of Twin Falls)

I, John W. Evans, declare that I am a plaintiff herein; that I have read the foregoing Amended Complaint and to the best of my knowledge the allegations contained therein are true and correct.

_____

On this ___ day of ___, 1988, before me, the undersigned, a notary public in and for said state, personally appeared John W. Evans, known to me to be the person

whose name is subscribed to the foregoing Complaint and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Notary Public for Idaho
Residing at
My Commission Expires:

APPENDIX C

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

JOHN W. EVANS and THE ESTATE OF L. JUANITA EVANS, Plaintiff, vs. TWIN FALLS COUNTY, governmental entity; HAROLD JENSEN, GARY KAUFMAN, and MARK E. STEVENS, individuals. Defendants.	Case No. 40121 MEMORANDUM OPINION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Filed February 13, 1989)

This is a tort action against Twin Falls County and three deputy sheriffs for alleged police misconduct. For the reasons stated below, defendants are entitled to summary judgment.

A judgment was entered against the plaintiffs, Mr. and Mrs. Evans, in early 1987. The judgment was the result of a dispute between the plaintiffs and their neighbors, the Bubaks. To satisfy the judgment of $18,000, the Twin Falls County Sheriff's Office was ordered to serve a writ of execution on the plaintiffs.

On April 15, 1987, Twin Falls County Deputy Sheriffs went to the plaintiffs' residence. Chief Deputy Jensen and deputies Kaufman, Stevens, Tilsen, and Thornquist were assigned to serve the writ of execution. Defendants Jensen, Kaufman and Stevens went to the house and

ultimately went in. Once inside the house, Deputy Kaufman told the Evans' why he was there and explained that he and the other deputies were there to pick up some farm equipment to satisfy the judgment entered against the Evans'.

There is a dispute as to what happened next. The plaintiffs definitely contacted an attorney and offered the deputies a personal check to settle the judgment. The deputies responded that it must be cash or a cashier's check, causing an argument to break out. The plaintiffs contend that Chief Deputy Jensen then grabbed and shook Mrs. Evans while threatening to arrest her. Chief Deputy Jensen contends Mrs. Evans made disparaging remarks to him and came at him with raised hands in an attempt to strike him. He claims to have diverted Mrs. Evans hands, resulting in her stumbling toward the floor.

After everyone calmed down somewhat, Mrs. Evans and her daughter-in-law proceeded to town and got a cashier's check in the amount of $18,000. They gave the check to Deputy Stevens who had followed them into town from the farm. Stevens then contacted the deputies waiting at the farm and told them they could leave.

A motion for summary judgment should be granted, "if the pleadings, depositions and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c).

In this type of proceeding, the court must liberally construe the facts in favor of the non-moving party and draw all reasonable inferences in favor of the non-moving

party. The "adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is no genuine issue for trial." I.R.C.P. 56(e) *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986).

Plaintiffs brought this suit pursuant to the Idaho Tort Claims Act and 42 U.S.C. Sec. 1983. The plaintiffs allege that Chief Deputy Jensen physically abused Mrs. Evans. It is also alleged that the deputies falsely imprisoned and falsely arrested the Evans'. Plaintiffs further contend that the deputies were "rude, loud, vulgar, threatening and unnecessarily demanding." The plaintiffs contend that the conduct of the deputies resulted in "pain and suffering, fright, emotional upset, battery to Mrs. Evans, unlawful arrest and distress to both plaintiffs" and that as a result of this incident Mrs. Evans suffered a fatal heart attack some eleven months later. Plaintiffs lastly claim that the deputies interfered with the contract between plaintiffs and their mechanic.

The defendants contend that the actions taken by the deputies were within the scope of their duty when serving the writ of execution. They argue that they are immune from liability pursuant to I.C. Sec. 6-904(3). They further allege that the plaintiffs have offered no proof that they were deprived of any constitutional rights.

Plaintiffs claim that Mrs. Evans suffered emotional distress, elevated blood pressure and physical pain as the result of the alleged assault and battery by Chief Deputy Jensen. This pain and suffering was personal to Mrs. Evans. This kind of personal injury does not survive

death. "The philosophy simply stated is that an injured person who is dead cannot benefit from an award for his pain and suffering. Therefore, an action for pain and suffering does not survive the death of the injured." *Vulk v. Haley*, 112 Idaho 855, 735 P.2d 1309 (1987).

Plaintiff, John Evans, in oral argument, asked this court to look at *Rogers v. Yellowstone Park Company*, 97 Idaho 14, 539 P.2d 566 (1975) and *Doggett v. Boiler Engineering and Supply Company*, 93 Idaho 888, 477 P.2d 511 (1970). These two cases allowed damages to the community to be recovered. *Roger, supra*, however, says that any injury to the spouse and the pain and suffering that arises from that injury, is an injury to the spouse as an individual. This gives the spouse the right to recover for personal injuries. *Vulk, supra*, clearly states that the pain and suffering complained of herein, does not survive one's death.

Plaintiffs allege that the incident with the police caused Mrs. Evans to have a fatal heart attack eleven months later. All reasonable inferences must be given to the plaintiff on this issue, but they do not provide the specific facts to show that there is a genuine issue for trial as required by I.R.C.P. 56(e).

The defendants offer the deposition testimony of Dr. Carl Bontrager and an affidavit of Dr. Donald Stott. Dr. Bontrager examined Mrs. Evans on April 17, 1987, two days after the incident with the deputies. Mrs. Evans went to Dr. Bontrager with chest pains. He examined her in the emergency room at Magic Valley Regional Medical Center and determined that she was not suffering from a heart attack and sent her home. He prescribed medication

to calm her down and to help her sleep. He stated that, based on his records of that night, he did not see anything that would have led him to believe that Mrs. Evans would have any ongoing problem of a medical nature.

Dr. Stott is board certified in cardiovascular disease and internal medicine. Upon his review of Mrs. Evans' medical records, he agreed with Dr. Bontrager's conclusion that Mrs. Evans did not have a heart attack on April 17, 1987. Dr. Stott further stated that it was his opinion, "within a reasonable degree of medical probability that there is no causal relationship, whatsoever, between any of the events that occurred at the Evans' home on April 15, 1987 involving representatives of the Twin Falls County Sheriff's Department and Mrs. Evans' death as a result of cardiac arrest on March 23, 1988." He went on to state that from a "medical standpoint, it is entirely unreasonable to even suggest any connection, whatsoever, between these events and circumstances."

The plaintiffs offer an affidavit of John Evans, a named plaintiff and husband of Mrs. Evans. He offers his opinion that the incident with the deputies "wore" Mrs. Evans "down and aggravated her to the point that the incident was a proximate cause of her death." This is not valid medical testimony. Plaintiffs have not shown any admissible evidence of proximate a relationship between the alleged incident and Mrs. Evans' death.

Plaintiffs made allegations of false arrest, false imprisonment, interference with a contract, as well as the assault and battery to Mrs. Evans. These actions come under the exceptions to liability portion of I.C. Sec. 6-904(3). I.C. Sec. 6-904(3) reads: "A governmental entity

and its employees, while acting within the course and scope of their employment and without malice or criminal intent, shall not be liable for any claim which: (3) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, liable, slander, misrepresentation, deceit, or interference with contract rights." At the time of the alleged incident, the deputies were serving a valid writ of execution.

The plaintiffs make a claim of false arrest. There were no arrests made on April 15, 1987. An arrest is defined in I.C. Sec. 19-601 as, "An arrest is taking a person into custody in a case and in a manner authorized by law. An arrest may be made by a peace officer or a private person." I.C. Sec. 19-602 defines when an arrest is made, "An arrest is made by an actual restraint of the defendant or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention." In this instance, no one was taken into police custody. Mrs. Evans was not in police custody when she went to her local bank to get the cashier's check. Mr. Evans was not in police custody when he stayed at home with the deputies. Mr. Evans testified in his deposition, that he was not told that he could not leave his house, nor did he attempt to leave. Placing a person into custody is a critical part of making an arrest. *State v. Hobson*, 95 Idaho 920, 523 P.2d 523 (1974).

Nothing in the record shows that anybody was placed under police custody. Mr. Evans testified that nobody told him he could not leave his house. There were no arrests made by any of the deputies.

"False imprisonment is the unlawful restraint by one person of the physical liberty of another, or more exactly, the direct restraint by one person of the physical liberty of another without adequate legal justification or without probable cause." *Clark v. Alloway*, 67 Idaho 32, 170 P.2d 425 (1946).

There is nothing in the record to show that there were any restraints on the personal movements of the plaintiffs. Therefore, there was no false imprisonment. Throughout Mr. Evans' deposition, he testifies that the deputies did not tell him that he could not leave his house. He also testified that he did not try to leave his house. Mr. Evans testified that while his wife was at the local bank, he sat and listened to a conversation between Deputy Kaufman and his son, Billy Evans, about some people that they both knew. No one was placed in police custody, nor was anyone told that they could not leave the house if they wished. There are no facts to support an allegation of false arrest or false imprisonment.

The plaintiffs claim that the defendants interfered with contractual relations by keeping their mechanic from repairing the farm equipment involved. They further contend that the mechanic was told not to move any of the farm equipment and, as a result, he could not finish his work. This interference of a contract is also an exception to liability through I.C. Sec. 6-904(3). Elmer Daarud, the mechanic, testified in his deposition that he was not told that he could not work on the equipment. He was only told that he could not move the equipment. If this constitutes an interference with contract, (highly doubtful.) the deputies actions are immune under I.C. Sec. 6-904(3).

Plaintiffs claim that the actions of the officers proximately caused emotional distress to both Mr. and Mrs. Evans. As stated above, Mrs. Evans' claim does not survive her death. As to Mr. Evans, it is not clear whether he claims that the emotional distress arises from negligent infliction or intentional infliction of emotional distress. If it is a claim of negligent infliction, there must be some physical injury caused by the emotional distress. *Gill v. Brown*, 107 Idaho 1137, 695 P.2d 1276 (Ct. App. 1985). The plaintiff alleges that he had to take medication for his blood pressure as a result of the emotional distress. The facts in the record do not support this. Dr. James Spafford testified in his deposition, that he first saw Mr. Evans on November 12, 1986. He testified that on that date, he was already suffering from a high blood pressure problem. Dr. Spafford testified that Mr. Evans was overweight with mild hypertension and he recommended that Mr. Evans get his blood pressure checked every two weeks. Mr. Evans did not see Dr. Spafford again until August 3, 1987. The doctor testified that Mr. Evans continued to have high blood pressure problems. When asked if with medical certainty that Mr. Evans condition was connected to the incident on April 15, 1987, the doctor testified, "No, I couldn't make a connection." He was then asked, "You don't feel that's –" and answered, "This was unrelated with what went on, I believe."

The allegations that Mr. Evans high blood pressure was caused by the deputies actions is not borne out by the facts. The plaintiffs allege that this is the cause, but offer nothing to back it up. Expert medical testimony would be needed.

The plaintiffs may have brought the claim under an intentional infliction of emotional distress. There are four elements that the plaintiffs must show to be able to recover on such a theory:

1. The conduct must be intentional or reckless;

2. The conduct must be extreme and outrageous;

3. There must be a causal connection between the wrongful conduct and the emotional distress, and;

4. The emotional distress must be severe. *Davis v. Gage*, 106 Idaho 735, 682 P.2d 1282 (Ct. App. 1984).

The record does not establish that all four elements have been met. In *Davis, supra*, the court stated, "Severe emotional distress may be shown, either by physical manifestation of the distress or subjective testimony." As previously stated, the physical manifestations complained of, were present before the incident on April 15, 1987. As for the subjective testimony, the plaintiffs don't offer any. The plaintiffs allege, in their amended complaint, that Mr. Evans suffered high blood pressure and physical pain. Nowhere else does he describe or talk about these conditions. In *Davis*, testimony was offered that the people involved "were upset, embarrassed, angered, bothered and depressed." The court stated that, "liability, however, only results when these results are so severe that no reasonable person can be expected to endure it." There are no facts that show the required severity. The facts and records do not indicate that Mr. Evans suffered any actionable emotional distress.

The plaintiffs next allege that their constitutional rights were violated by the defendants. The plaintiffs

have not pled any specific constitutional violation. The cases that the plaintiffs offer in support of the Section 1983 action show that outrageous conduct by the police was involved. As the plaintiff pointed out, *Johnson v. Glick*, 481 F.2d 1029 (2nd Cir. 1973) stated what must be taken into consideration when determining, whether or not, "the constitutional line" has been crossed. The court stated, "The court must look to such factors as need for the application of force through relationship between the need and the amount of force that was used, the extent of injury inflicted and whether force was applied in a good faith effort to maintain or restore discipline, or maliciously or sadistically for the very purpose of causing harm."

If it weren't for immunity, this would go to the conduct concerning Mrs. Evans. It has already been established that her cause of action did not survive her death. Mr. Evans has not stated any actions taken by the deputies that may have violated his constitutional rights. He claims emotional distress as a result of the alleged incident between Chief Deputy Jensen and Mrs. Evans. The alleged emotional distress does not come under constitutional protection.

The incident of April 15, 1987, does not shock the conscience as the facts in the cases cited by the plaintiff. The defendants had a valid writ of execution to serve. The deputies told the plaintiffs their reason for being at the plaintiff's home. They allowed Mrs. Evans to go to her local bank and get a cashier's check to satisfy the judgment. Mr. Evans testified that he did not try to leave his house, nor did deputies tell him that he could not leave the house. The alleged grabbing and shaking of

Mrs. Evans does not arise to this constitutional level. Looking at this point most favorably to the plaintiffs, there are no facts to show that Mrs. Evans was maliciously or sadistically beaten. At the most, she was grabbed and shaken. This would come under a state claim for assault and battery. Even as such, this claim would not survive Mrs. Evans' death.

Twin Falls County is also a named defendant. In *Doe, supra,* the court stated, "A plaintiff must allege sufficient facts which, if proven, would demonstrate that the governmental entity should have reasonably anticipated that one of their employees would commit an intentional tort." The plaintiffs have not alleged any facts pertaining to Twin Falls County. The plaintiffs have not alleged the existence of any policy of Twin Falls County that was the cause of the plaintiff's damages. "A municipality is not liable under Section 1983, unless the constitutional violation implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by the body's officers." *Herrera v. Conner,* 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1987). Plaintiff has not offered anything to show that such a policy existed in Twin Falls County.

Based upon the foregoing arguments, the defendants motion for summary judgment is granted. Counsel for defendants is asked to prepare the necessary order.

IT IS SO ORDERED.

DATED This 9th day of February, 1989.

/s/ Daniel B. Meehl
DANIEL B. MEEHL
District Judge

CERTIFICATE OF MAILING

The undersigned certifies that on the 9th day of February, 1989, she caused to be mailed, or hand delivered, a copy of the foregoing MEMORANDUM OPINION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT to:

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/s/ Ellie Motzner